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WR Process MTR.

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November 20, 2000

Mr. Harry M. Schueller  
 Chief, Division of Water Rights  
 State Water Resources Control Board  
 P.O. Box 2000  
 Sacramento, CA 95812-0200

Re: Comments and Suggestions for Improving the Water Right Process  
 and Procedures

Dear Mr. Schueller:

We respond to your "Notice of Public Meeting: Improving the Water Rights  
 Process and Procedures." We incorporate our letter dated November 10, 2000  
 concerning the Division of Water Rights' ongoing evaluation whether to amend the 1997  
 Staff Report regarding pending applications in the Russian River Basin.

We present our comments in the order requested in your Notice. All of our  
 recommendations may be implemented under existing law and rules.



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### Application Processing

We support improved administration of the existing process to assure that all beneficial uses recognized by the Water Code are protected against impairment. One such beneficial use is preservation of salmon and steelhead fisheries in good condition above and below each storage or diversion works; or recovery to that condition, where significant degradation has already occurred. We recommend procedures to achieve the mandated preservation or recovery of those fisheries consistent with water supply and other beneficial uses.

#### 1. Pending Applications With Unpermitted Storage or Diversion Works

Field inspections and discussions with Division staff indicate that many pending applications for new permits relate to storage and diversion works have been built or operated without prior permit or other valid claim of right. Such appropriations cause adverse impacts to environmental quality that are, by definition, illegal; and they are unfair to other applicants who follow the law. The Division should use your discretion under the Water Code, including but not limited to sections 102, 226, 1243, 1243.5, and 1375(d), to:

- Determine how many of the pending applications relate to existing storage or diversion works built or operated without prior permit.
- Where the Division has reason to believe that an application relates to unpermitted appropriation, investigate whether the applicant has any colorable claim of right to justify the unpermitted appropriation.
- Publish notice when the Division so determines that the application relates to an apparently unpermitted appropriation so that any protestants may address that concern.
- Require the applicant to remedy any adverse environmental impacts caused by prior unpermitted appropriation.



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## 2. All Pending Applications

More generally, the Division staff should use your discretion under Water Code sections 226, 1243, 1243.5, and 1375(d), to:

- Generate a list of all pending applications by hydrologic basin.
- In coordination with the Department of Fish and Game (CDFG) and federal resource agencies, compile the existing record that may be helpful to evaluate the flow and other habitat conditions necessary to maintain fisheries in good condition in the affected stream.
- Evaluate the cumulative impacts of existing water rights on the quantity and time of flow in each affected stream. As the National Marine Fisheries Service (NMFS) recently concluded, the Division should "account for the maximum cumulative rate of withdrawal for all other water diversions (regardless of the basis of right) upstream of the proposed point of diversion."<sup>1</sup>
- Include in each permit appropriate management objectives for protection or recovery of affected fisheries. These objectives should describe the habitat conditions that the permit will achieve. Examples include: depth or width of passage at a riffle immediately below the diversion works. The Mono Lake Cases established such objectives for Los Angeles Department of Water and Power's diversions.
- Include in each permit a requirement to monitor and report the physical and biological conditions necessary to achieve the management objectives. Such monitoring should include: (a) inflow to the storage or diversion works; (b) outflow; (c) adjacent water quality conditions, such as temperature, turbidity, or dissolved oxygen; (d) width, depth, or any other condition of flow pertinent to the suitability of the adjacent channel as fish habitat; and (e) presence or absence of steelhead or salmon.

<sup>1</sup> Letter from Steve Edmondson, Regulatory Support Team Leader, National Marine Fisheries Service, to Harry M. Schueller, Chief, Division of Water Rights, State Water Resources Control Board at 2 (Nov. 9, 2000).



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### **Compliance**

We believe that an improved program to assure compliance with permit and license terms will be necessary to contribute to the recovery of steelhead and salmon fisheries. More specifically, we suggest that Division staff exercise their discretion to:

- Track all filed Statements of Use, and confirms the accuracy of each filed statement.
- Evaluate compliance with required conditions for protection of environmental quality, including fisheries.
- Using reserved authorities, and where appropriate to evaluate cumulative impacts, require existing permittees and licensees to monitor and report: (a) inflow to their storage or diversion works; (b) outflow; (c) adjacent water quality conditions, such as temperature, turbidity, or dissolved oxygen; (d) width, depth, or any other condition of flow pertinent to the suitability of the adjacent channel as fish habitat; and (e) presence or absence of steelhead or salmon.
- Assure that the Division (alone, or in concert with DFG and federal resource agencies) has authority and permission to inspect works as necessary to assure compliance.
- Assure that the Division will use monitoring results collected by the Regional Water Quality Control Board or CDFG for the purpose of evaluating cumulative impacts on fisheries.
- Using reserved authorities, and where appropriate to remedy cumulative impacts in a given stream, amend existing permits and licenses as necessary for the recovery of affected fisheries.

We also support NMFS' November 9<sup>th</sup> recommendation that the Division undertake a gauging program in circumstances where that duty cannot properly be required of existing permittees and licensees.

### **Enforcement**

The Water Code, including section 1825, provides adequate authority to remedy non-compliance with permit and license conditions or otherwise unpermitted appropriations. We recommend that the Division systematically investigate the extent



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and impacts of such non-compliance on degraded fisheries, and then take appropriate enforcement actions.

Licensing


Before issuing a license, the Division should evaluate whether a given permit had adverse impacts on environmental quality that are different in nature or scope than predicted in the underlying permit proceeding; and if so, consider amended conditions.

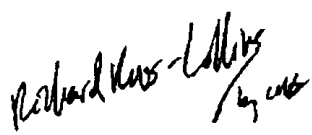
Hearings

We have no recommendations at this time.

Thank you for consideration of our comments.

Respectfully submitted,

  
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